United States Department of the Interior
Office of Hearings and Appeals
139 East South Temple, Suite 600
Salt Lake City, Utah 84111

October 14, 1999

AMENDED RECOMMENDED ORDER

NINILCHIK TRADITIONAL COUNCIL,	:	IBIA 99-72-A
	:	
Appellant	:	Appeal of December 23, 1998, decision
	:	issued by Director, Alaska Area Native
v.	:	Health Service, Indian Health Service
	:	
	:	Indian Self Determination Act (ISDA)
DIRECTOR, ALASKA AREA NATIVE	:	25 U.S.C. §§ 450-450n
HEALTH SERVICE, INDIAN HEALTH	:	
SERVICE,	:	
	:	
Appellee	:	

Motion for Summary Judgment Granted:
Request for Certification for Interlocutoiry Appeal Denied

The October 13, 1999, Recommended Order issued by this office incorrectly refers to Appellant as "Appellee" in two instances. Therefore, this Amended Recommended Order is issued to correct those two clerical errors and the October 13, 1999, Recommended Order is hereby vacated and superceded by this Amended Recommended Order, which is identical in substance.

On September 27, 1999, this office received Appellant's Motion for Summary Judgment. On October 8, 1999, Appellee filed a response in opposition to the motion. Meanwhile, on October 6, 1999, Appellee's Request for Interlocutory Appeal and Stay of Proceedings was filed. Appellee seeks certification for interlocutory appeal of my Order dated September 14, 1999, denying Appellee's motion to transfer the matter to the Interior Board of Contract Appeals. That motion was based upon the allegation that the Interior Board of Indian Appeals (IBIA) and this office, as a delegate of the IBIA, do not have iurisdiction over the matter. For the reasons set forth below, Appellant's motion for summary judgment is granted and Appellee's request for certification for interlocutory appeal is denied.

This matter involves Appellant's September 25, 1998, proposal for a successor annual funding agreement for fiscal year (FY) 1999 funding of approximately $235,000 in Contract Support Costs (CSC) for indirect-like costs under an existing IndianSelf-Determination Act (ISDA) contract with an indefinite term. Under that contract indirect costs were paid by Appellee for previous fiscal years based upon an indirect rate negotiated by Appellant and the Department of Health and Human Services Division of Cost Allocation (DCA). On May 5, 1998, Appellant was informed that its negotiated indirect rate had lapsed and that Appellant would have to negotiate a new indirect rate or indirect-like costs before indirect or indirect-like costs could be awarded for FY 1999. In response Appellant submitted the proposal for indirect-like costs approximating the amount of funding awarded for indirect costs for fiscal year 1998 ($234,704).

Appellee determined that Appellant should be paid $138,553 for indirect-like costs, or a reduction of approximately $96,500 in the amount proposed by Appellant and the amount which Appellant had received in FY 1998 under its ISDA contract. According to Appellee, its determination to reduce the funding

> was based primarily on two factors: 1) Indirect-like costs in the proposal for administrative personnel were a duplication of administrative costs previously paid to Appellant as program dollars that were in support of Appellant's health administration scope of work, and 2) If the amount of CSC indirect-like costs proposed was intended to be in addition to the administrative costs previously paid with program dollars the amount proposed was not reasonable given that Appellant would be administering a program base of $212,666 with $229,568 in administrative costs.

Appellee explained that it believed the proposed amount was illegal under statutory provisions limiting funding to "reasonable" costs, 25 U.S.C. § 450j-1(a)(2), and prohibiting CSC funding from duplicating program funding already provided under 25 U.S.C. § 450j-1(a)(1). 25 U.S.C. § 450j-1(a)(3)(A).

25 C.F.R. § 900.32 provides that IHS cannot decline, in whole or in part, a tribe's proposed successor annual funding agreement if it is substantially the same as the prior annual funding agreement unless a funding reduction is authorized by 25 U.S.C. § 450j-1(b). Under paragraph (2) of subsection 450j-l(b), the amount of funding for such costs which is initially provided under an ISDA contract

> (2) shall not be reduced by the Secretary in subsequent years except pursuant to—
>
> > (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
> (C) a tribal authorization;
> (D) a change in the amount of pass-through funds needed under a contract; or
> (E) completion of a contracted project, activity, or program[.]

Appellee's reduction in the amount of funding to be provided Appellant was not based upon any of the statutorily permissible reasons for such a reduction.

Consequently, Appellee's refusal to fully fund Appellant's proposal cannot be upheld. In the absence of a statutorily permissible reason for a reduction, summary judgment must be granted in favor of Appellant approving its proposal and adding to its ISDA contract the full amount of funds proposed.

Appellee's argument that the FY 1999 proposal was not "substantially the same" as its prior annual funding agreement cannot be sustained. It argues that it was not substantially the same because Appellant's DCA-negotiated, indirect cost rate lapsed and Appellee then made its own independent determination that the amount proposed was illegal. Its argument does not show that the proposal differed from the previous annual funding agreement but, rather, that the decisionmaker [1] and resulting conclusions differed.

Appellee contends that once the DCA-negotiated, indirect cost rate lapsed, it had a statutory duty to independently evaluate whether the proposed amounts were reasonable and not duplicative. Certainly, it has this duty when a ISDA contract is first consummated, but once a contract is approved and funded, the statute does not allow for a reduction of the amount funded under the guise of reevaluating whether the amounts are reasonable or duplicative.

Appellee identifies the following disputed facts: "[w]hether there is duplication of funding for some $96,000 in CSC funding and whether the amount of CSC to administer the program is unreasonable given the size of the program." These disputed facts are simply not material to the legal issue of whether a statutorily permissible reason existed for reducing the funding.

[1] Whether the decisionmaker was actually different is open to argument. Both DCA and Appellee are delegates of the same official: the Secretary of the Department of Health and Human Services.

Based upon the foregoing, summary judgment is hereby granted in favor of Appellant in that its proposal is approved and the full amount of funds proposed shall be added to its ISDA Contract.

In light of this ruling, Appellee's request for certification for interlocutory appeal is denied. If summary judgment had not been appropriate, I would have certified the matter for interlocutory appeal because my September 14, 1999, Order addressing the jurisdiction of the IBIA and this office involved a controlling question of law and an immediate appeal would have materially advanced the final decision. See Alaska v. Thorson, 76 IBLA 264, 265 (1983), rev'd, 83 IBLA 237 (1984); 43 C.F.R. § 4.28. However, because I have determined that summary judgment is appropriate, an interlocutory appeal would not materially advance the final decision. If Appellee chooses to appeal this Order, it may raise any jurisdictional issues during the course of that appeal.

In consideration of the foregoing, the hearing for this matter set to commence October 25, 1999, is vacated.

Harvey C. Sweitzer
Administrative Law Judge